

Form 3-49
(Rule 3-49)

COURT FILE NUMBER

QBG 395/2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE

SASKATOON

APPLICANT(S)

JASMIN GRANDEL AND DARRELL MILLS

RESPONDENT(S)

THE GOVERNMENT OF SASKATCHEWAN AND DR.
SAQIB SHAHAB in his capacity as CHIEF MEDICAL
HEALTH OFFICER FOR THE PROVINCE OF
SASKATCHEWAN**ORIGINATING APPLICATION****NOTICE TO THE RESPONDENT(S)**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court. To do so, you must be in Court when the application is heard as shown below:

Where 520 Spadina Crescent East,
Saskatoon SK, S7K 3G7Date May 4, 2021Time 10:00 a.m.

Go to the end of this document to see what you can do and when you must do it.

PARTICULARS OF APPLICATION**The Applicants seek the following remedies and orders:**

1. An Order abridging the time for the service of this application, if necessary;
2. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that clauses 1(d) and 4(d) of the "Public Health Order – Provincial Order" issued by the Chief Medical Health Officer on March 30, 2021 (the "March 30 Order") and similar provisions which have previously been, or may subsequently be, ordered by the Chief Medical Health Officer (collectively, the "Outdoor Gathering Restrictions"), in restricting the gathering of persons outdoors for peaceful, collective demonstrations or protests, unjustifiably infringe the freedoms of thought, opinion, belief, expression, peaceful assembly and association as protected by sections 2(b), 2(c) and 2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter") respectively, and are therefore of no force or effect.
3. Further, or in the alternative, a Declaration pursuant to section 24(1) of the *Charter* that the

Outdoor Gathering Restrictions and their enforcement constitute unreasonable and unjustified infringements of the Applicants' freedoms of thought, belief, opinion and expression, peaceful assembly and association, as protected by sections 2(b), 2(c) and 2(d) of the *Charter* respectively.

4. Further, or in the alternative, an Order pursuant to section 24(1) of the *Charter* enjoining the Respondents from further enforcement of the Outdoor Gathering Restrictions against the Applicants.
5. Costs.
6. Such further and other relief as counsel may advise and as this Honourable Court deems just and equitable.

The Applicants' summary of material facts is as follows:

Background

7. The freedom of people to assemble in public outdoor spaces and peacefully protest is fundamental to any free and democratic society. This freedom is an essential means for otherwise unheard individuals—when assembled together in significant numbers—to garner attention for their concerns, particularly from government leaders.
8. Beginning on March 17, 2020, Chief Medical Health Officer Dr. Saqib Shahab has made dozens of public health orders (the "Public Health Orders") in relation to the novel coronavirus known as "SARS-CoV-2" (the "Virus") and the associated respiratory illness known as "COVID-19".
9. The Public Health Orders have established rules of general and universal application which have had a sweeping effect on the rights and freedoms of Saskatchewanians.
10. Among the many provisions of the Public Health Orders are the Outdoor Gathering Restrictions, which have placed restrictions on the freedom of all Saskatchewanians to gather outdoors, including for the purpose of engaging in collective demonstrations or protests.
11. The Outdoor Gathering Restriction currently in force Saskatchewan is embodied in paragraphs 1(d) and 4(d) of the March 30 Order.
12. Paragraph 1(d) of the March 30 Order reads as follows:

Subject to 4(d), public and private outdoor gatherings are permitted up to 10 persons. Persons in attendance must ensure that physical distancing of at least two metres between households is maintained.

This subsection does not apply to events and activities to the extent that the guidelines applicable in the *Re-Open Saskatchewan Plan*, as amended from time to time, on the Government of Saskatchewan website (saskatchewan.ca) explicitly permits or requires an alternative gathering size. In such a case, the gathering size

explicitly permitted or required shall not be exceeded, and specified physical distancing shall be maintained.

13. Paragraph 4(d) of the March 30 Order reads as follows:

In the Regina Region, public and private outdoor gatherings are permitted up to 10 persons. Persons in attendance must ensure that physical distancing of at least 2 meters between households is maintained.

This subsection does not apply to events and activities to the extent that the guidelines applicable in the *Re-Open Saskatchewan Plan*, as amended from time to time, on the Government of Saskatchewan website (Saskatchewan.ca) explicitly permits or requires an alternative gathering size. In such a case, the gathering size explicitly permitted or required shall not be exceeded and specified physical distancing shall be maintained.

14. The *Re-Open Saskatchewan Plan* (the "Re-Open Plan") has not contained—and presently does not contain—any alternative gathering size for outdoor demonstrations or protests.

15. Paragraphs 1(d) and 4(d) (the latter pertaining to the Regina Region) of the March 30 Order are substantively identical to paragraph 1(c) of the "Public Health Order – Provincial Order" issued by the Chief Medical Health Officer on December 14, 2020 (the "December 14 Order"), paragraph 1(c) of the "Public Health Order – Provincial Order" issued by the Chief Medical Health Officer on January 26, 2021 (the "January 26 Order"), paragraph 1(c) of the "Public Health Order – Provincial Order" issued by the Chief Medical Health Officer on February 18, 2021 (the "February 18 Order"), and paragraphs 1(d) and 4(d) (the latter pertaining to the Regina Region) of the March 30 Order.

16. The January 26 Order, the February 18 Order, and the March 30 Order are each purportedly made pursuant to section 45(2) of *The Public Health Act, 1994*, SS 1994, c P-37.1 as amended (the "*PHA 1994*") and section 25.2 of the *Disease Control Regulations*, RRS c P-37.1 Reg 11 as amended (the "DCRs"). The December 14 Order was purportedly made pursuant to both sections 38 and 45(2) of the *PHA 1994* and section 25.2 of the DCRs.

17. The DCRs have ostensibly been made pursuant to the regulation-making authority conferred on the Lieutenant Governor in Council ("LGIC") by section 46(1) of the *PHA 1994*.

18. The Re-Open Plan itself does not purport to be enacted pursuant to any statute or regulation. Rather, it is simply published on the Government of Saskatchewan website. Further, the Re-Open Plan is frequently amended by unnamed officials within the Government of Saskatchewan, with no notice given in the Saskatchewan Gazette. The Re-Open Plan—including as subsequently amended—was purportedly made binding on all Saskatchewanians by way of the adoption of section 25.1 of the DCRs.

19. Sections 25.1 and 25.2 of the DCRs came into being by way of the *Disease Control (COVID-19)*

Amendment Regulations, 2020, SR 127/2020, made by the LGIC by way of Order in Council 542/2020, dated December 2, 2020 and filed December 3, 2020.

20. *Per* section 61 of the *PHA 1994*, it is an offence to contravene "any provision" of that statute "or a regulation, bylaw or order made pursuant to" that statute. *Per* section 61(a)(i), individuals are subject "for a first offence", "to a fine of not more than \$75,000" as well as "to a further fine of \$100 for each day during which the offence continues". *Per* section 61(a)(ii), individuals are subject "for a second or a subsequent offence", "to a fine of not more than \$100,000" as well as "to a further fine of not more than \$200 for each day during which the offence continues".

Applicant Jasmin Grandel

21. The Applicant Jasmin Grandel is a resident of Regina, a kinesiology student at the University of Regina and mother to a six-year-old son who is presently in kindergarten.
22. Ms. Grandel is concerned that there is a lack of transparency and consistency from the Government of Saskatchewan and Saskatchewan Health Authority regarding the information on which they base their decisions.
23. Ms. Grandel is also concerned about the detrimental psychological, economic and sociological effects caused by the Public Health Orders, including the closing of small businesses and resultant unemployment and loss of income to many Saskatchewan families.
24. These concerns motivated Ms. Grandel to participate in peaceful outdoor protests to express her dissatisfaction with the restrictions imposed on Saskatchewanians by the Public Health Orders.
25. These protests have all occurred outdoors in large public spaces, where participants can naturally physically distance.
26. On December 19, 2020, Ms. Grandel spoke at a peaceful protest in front of the Vimy Memorial in Saskatoon, addressing the negative impacts of the Public Health Orders and the attacks on people who express their concerns about the restrictions imposed by the government.
27. The protest was attended by a large group of people, who were naturally physically distanced and well dressed, with many wearing toques, scarfs and mitts. The temperature was cold, being -6°C, -12°C with the windchill.
28. On January 7, 2021, Ms. Grandel was issued a summons for failure to comply with clause 1(c) of the December 14 Order for attending the outdoor protest on December 19, 2020.
29. On February 10, 2021, Ms. Grandel was issued a summons for failure to comply with clause 1(c) of the January 26, 2021 Order, for attending an outdoor protest at the Saskatchewan Legislature in Regina on January 30, 2021.

30. On February 20, 2021, Ms. Grandel was issued a summons for failure to comply with clause 1(c) of the February 18, 2021 Order, for attending an outdoor protest near the Cenotaph in Victoria Park in Regina on February 20, 2021.
31. On March 11, 2021, Ms. Grandel was issued a summons for failure to comply with clause 1(c) of the December 14, 2020 Order, for attending an outdoor protest in a large greenspace near Main Street in Moose Jaw on January 16, 2021.
32. On March 30, 2021, Ms. Grandel was issued a summons for failure to comply with paragraph 4(d) of the Public Health Order Provincial Order dated March 23, 2021, for attending an outdoor protest near the Cenotaph in Victoria Park in Regina on March 27, 2021.

Applicant Darrell Mills

33. The Applicant Darrell Mills is a resident of Saskatoon with 30 years of experience in mechanical construction. He is certified in Mask Fit Testing and trained in supplied air breathing systems.
34. Mr. Mills is worried that the negative effects of improper mask-wearing are not known to the public. He is concerned that the limited exemptions provided puts a tremendous strain on people who cannot wear a mask due to emotional, psychological and physical health issues.
35. These concerns have motivated Mr. Mills to participate in peaceful outdoor protests against the restrictions imposed by the Public Health Orders, including the mandatory wearing of masks.
36. Mr. Mills also spoke at the December 19, 2020 peaceful outdoor protest at Vimy Memorial Park in Kiwanis Park in Saskatoon. He spoke about his concerns regarding the harm of improper mask wearing and the lack of respect for people with emotional, psychological and physical health conditions that prevent them from wearing masks.
37. On January 11, 2021, Mr. Mills received a summons in the mail for failure to comply with paragraph 1(c) of the December 14, 2020 Order, for attending the peaceful outdoor protest held on December 19, 2020.
38. Both Ms. Grandel and Mr. Mills have an ongoing interest in meaningfully exercising their fundamental freedom to peacefully protest. They continue to face legal jeopardy for doing so as a result of the Outdoor Gathering Restrictions.
39. They are two of a number of other Saskatchewanians who have been issued summonses for exceeding the Outdoor Gathering Restrictions while gathering to protest government restrictions on individual rights and freedoms.

Outdoor protests pose a minimal transmission risk

40. Outdoor gatherings, such as those in which the Applicants have participated, pose a minimal risk

of transmission, and certainly less than the transmission risk of indoor gatherings permitted by the Public Health Orders and the *Re-Open Saskatchewan Plan*.

The Applicants' grounds for making this Application are:

The Constitution—including the *Charter*—is the supreme law of Canada

41. As confirmed by section 52(1) of the *Constitution Act, 1982*, “the Constitution of Canada is the supreme law of Canada”. All ordinary statutes, all regulations, all public health orders, and all other government action are subject to its terms, and “any law that is inconsistent” with those terms “is, to the extent of the inconsistency, of no force or effect.”
42. Included within this supreme law are the rights and freedoms conferred upon Saskatchewanians by the *Charter*.
43. These rights and freedoms are not suspended by public health concerns or a declared state of emergency. Rather, the Government of Saskatchewan—including the Chief Medical Health Officer—is obliged to carry out its duties in a manner that respects these rights and freedoms.
44. As explicitly enumerated in its opening section, the *Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
45. The burden of proving justification of a limit on *Charter* rights therefore lies on the state actor responsible for the limitation.

Fundamental freedoms of Saskatchewanians

46. Among the rights guaranteed to Saskatchewanians by the *Charter* are the fundamental freedoms of thought, belief, opinion and expression (as protected by section 2(b)), peaceful assembly (as protected by section 2(c)), and association (as protected by section 2(d)).

Freedom of thought, belief, opinion and expression – *Charter* section 2(b)

47. The freedom of thought, belief, opinion and expression as entrenched within the *Charter* extends constitutional protection to all human activity intended to convey a meaning, so long as the method (e.g. violence) or location of the activity does not exclude it from that protection. Section 2(b) also shields the right to receive expression, protecting listeners as well as speakers.
48. Among the core values underlying constitutional protection for free expression are truth seeking, self-fulfilment and democratic discourse. The closer the expression in question lies to these core values, the harder it will be for the state actor to justify an infringement of the freedom to engage in that expression.

49. Expression of thoughts, beliefs and opinions in relation to matters of public concern lies at the very heart of these core values. The free exchange of ideas and opinions is critical to a functional democracy, and stifling this free exchange threatens democratic government.

Freedom of peaceful assembly – Charter section 2(c)

50. The freedom of peaceful assembly as entrenched within the *Charter* protects the public expression of opinion through protest and demonstration.
51. By definition, peaceful assembly protects the right of people to physically gather.
52. Peaceful assembly equalizes access to the dissemination of viewpoints, by providing groups without the means to afford advertising with public and media exposure through protests, with the corollary benefit to society of bringing *bona fide* wrongs to the public's attention.
53. Further, free assemblies allow government authorities to gauge grassroots support for a specific point of view. Public protests also can put pressure on government leaders to address the concerns communicated by the individuals who participate in them.

Freedom of association – Charter section 2(d)

54. The freedom of association as entrenched within the *Charter* recognizes the social nature of people's efforts and protects individuals from being isolated in pursuing their goals.
55. Section 2(d) protects the right to join with others and to collectively exercise constitutional rights.
56. An infringement of section 2(d) is established when the impugned law or government action constitutes "a substantial interference with freedom of association" in either its purpose or effect.

The Outdoor Gathering Restrictions infringe Saskatchewanians' rights under sections 2(b), 2(c) and 2(d) of the Charter

57. The Outdoor Gathering Restrictions—as applied to the gathering of persons outdoors for collective demonstrations or protests—infringe the *Charter* rights of Saskatchewanians to the fundamental freedoms of thought, belief, opinion and expression, peaceful assembly and association.
58. In effect, the Outdoor Gathering Restrictions strike at the very heart of constitutional protection for free expression—restricting the number of Saskatchewanians who can freely and directly participate in the inherently expressive and political activity of collective public protest in outdoor settings otherwise open to the public.
59. The actions of the Government together with the experiences of the Applicants indicate that the Outdoor Gathering Restrictions have been used to target public expression against the Government's infringement of fundamental rights and freedoms.

60. This restriction on participation in expressive activity strikes both at the right to speak in such settings and the right to listen in solidarity with other participants.
61. As such, the Outdoor Gathering Restrictions also effectively strike at the very heart of constitutional protection for peaceful assembly—the physical gathering of people for “speech in action”.
62. In curtailing the number of participants in the type of protests at issue—the current limit being no more than 10 participants at a time—the Outdoor Gatherings Restrictions serve to limit the effectiveness of such protests in communicating the scale of concern within the broader community regarding the subject matter of protests, placing a chilling effect upon members of the public who might otherwise be inclined to communicate their solidarity by attending such protests, and placing those who choose to participate in legal jeopardy for the exercise of one of the most fundamental rights in a free society.
63. Joining together in person for such protests is an inherently associative activity protected by section 2(d) of the *Charter*, involving assembly for the purpose of exercising other constitutional rights and meeting the power and strength of the Government of Saskatchewan, which is presently restricting the liberties of Saskatchewanians on a scale unprecedented in peacetime Canadian history.
64. In restricting such activity, the Outdoor Gathering Restrictions constitute a substantial interference with the freedom of association as protected by the *Charter*.

The Outdoor Gathering Restrictions unjustifiably infringe the *Charter* freedoms engaged

65. The Outdoor Gathering Restrictions are legally binding rules of general and universal application, restricting the freedom of all Saskatchewanians to freely gather in outdoor settings, including for the exercise of the fundamental right of collective public protests on matters of public concern.
66. As such, the Outdoor Gathering Restrictions are properly viewed as laws for the purpose of constitutional review. To the extent that these restrictions unjustifiably infringe *Charter* rights, they are subject to a declaration of invalidity by this Honourable Court pursuant to section 52(1) of the *Constitution Act, 1982*.
67. To justify any infringements of *Charter* rights resulting from the Outdoor Gathering Restrictions, the Respondents bear the burden of proving that these infringements are justified under section 1 of the *Charter*, in accordance with the test set forth by the Supreme Court of Canada in *R v Oakes*, [1986] 1 SCR 103 (the “*Oakes* test”).
68. Such proof must be established by way of cogent and persuasive evidence that imposing the Outdoor Gathering Restrictions is demonstrably justified in a free and democratic society.

69. More specifically, the *Oakes* test requires the Respondents to prove that the Outdoor Gathering Restrictions were made pursuant to a pressing and substantial objective, that they are rationally connected to that objective, that they minimally impair the *Charter* rights they infringe, and that their salutary effects outweigh their deleterious effect on the *Charter* rights they infringe.
70. As applied to collective outdoor peaceful demonstrations and protests, the Outdoor Gathering Restrictions constitute unjustified infringements of the *Charter* freedoms of thought, belief, opinion and expression, peaceful assembly, and association.
71. There is no rational connection between the Outdoor Gathering Restrictions and the objectives of minimizing the transmission of the Virus. The risk of transmission of the Virus is minimal outdoors. The Government of Saskatchewan permits people to gather in larger numbers indoors where a transmission risk is much greater.
72. The Outdoor Gathering Restrictions do not minimally impair the *Charter* rights they infringe. While tens and hundreds of Saskatchewanians can legally gather in indoor facilities to dine or shop, only 10 persons are permitted to gather for a protest or demonstration outdoors, regardless of social distancing and size of the public space utilized.
73. The deleterious effect of the Outdoor Gathering Restrictions is not outweighed by any salutary effect. These restrictions strike at the very heart of activities central to the functioning of a free and democratic society, with little, if any, discernible corresponding benefit to the public health of Saskatchewanians.
74. The Outdoor Gatherings Restrictions should be declared to be of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*. Further, or in the alternative, this Honourable Court may issue a declaration pursuant to section 24(1) that the Outdoor Gathering Restrictions and government attempts to enforce them infringe the Applicants' *Charter* freedoms unjustifiably, and enjoin the Respondents from imposing or enforcing Outdoor Gatherings Restrictions against the Applicants.

In support of this application, the Applicants rely on the following material or evidence:

75. The Affidavit of Jasmin Grandel, sworn April 2, 2021;
76. The Affidavit of Darrell Mills, sworn April 5, 2021;
77. The Affidavit of Dr. Thomas Warren, to be sworn; and,
78. Such further and other material or evidence as the Applicants may provide and this Court may allow.

DATED at Calgary, Alberta, this 7th day of April, 2021.

(signature)

This notice is issued at the above-noted judicial centre on the 7th day of

April, 2021.

Court Seal

Local Registrar

NOTICE

You are named as a respondent because you have made or are expected to make an adverse claim with respect to this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form.

The rules require that a party moving or opposing an originating application must serve any brief of written argument on each of the other parties and file it at least 3 days before the date scheduled for hearing the originating application.

If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must serve a copy of the affidavit and other evidence on the originating applicant at least 10 days before the originating application is to be heard or considered.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm: Justice Centre for Constitutional Freedoms

Name of lawyer in charge of file: Marty Moore

Address of legal firms:

Telephone number:

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